NO. 87-312

COPY

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

JOHN ROBERT DUNCAN,

Petitioner,

v.

CALIFORNIA,

Respondent.

BRIEF IN OPPOSITION TO

PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

We accept as adequate petitioner's formulation of the questions presented for review because petitioner was charged with and convicted under a child pornography statute [1] which did not include among its elements the intent to distribute or display the material to other persons. We also accept as adequate petitioner's statement of the case (including the statement of facts) with one reservation. Petitioner complains that California Penal Code section 311.3, subdivision (a), made "criminal the act of the duplication of existing child pornographic material entirely within the limits of his own home

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1. The term "child pornography" is used herein to pertain to photographs or films depicting sexual conduct by children.

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and without the intent to distribute or display such materials or duplicates to any other persons." (Petition, p. 2.) No evidence was presented, at the trial, nor under the statute need it have been presented, that petitioner had any intention other than the preparation of duplicates for his own use. This is a far cry from saying that, as a matter of fact, petitioner had no intent to distribute or display the material to other persons. The contrary is suggested by the contents of a letter attached to the search warrant described in the superior court's memorandum of decision. (Appendix C to petition, pp. 8-10.) Moreover, although the circumstantial evidence supports the conclusion that petitioner's duplication of the offending material took place within his home, the statute under which

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he was charged and convicted is applicable to any act of duplication of child pornography, without limitation as to the situs of the act.

SUMMARY OF ARGUMENT

Assuming arguendo that the constitutional right to privacy embraces the mere private possession of child pornography, the duplication of child pornography, with or without an intent to distribute or display the same to others persons, is not similarly protected because the police power constitutionally extends to both the distribution and production of child pornography. Moreover, the right to merely possess child pornography, assuming arguendo it is of constitutional dimension, does not create the correlative

EDITOR'S NOTE

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right to acquire child pornography. The duplication of child pornography is a species of its production and a mode of its acquisition.

ARGUMENT

A STATUTE WHICH CRIMINALIZES THE DUPLICATION OF CHILD PORNOGRAPHY DOES NOT VIOLATE THE FEDERAL CONSTITUTIONAL RIGHT OF PRIVACY

Petitioner's argument is essentially as follows: The state cannot constitutionally proscribe the mere possession of child pornography in the privacy of one's home. If such mere possession of child pornography is encompassed within the constitutional right of privacy, the duplication of a photograph without the

intent to distribute or display it to another person is similarly protected. As we shall see, this argument is fundamentally fallacious.

In Stanley v. Georgia, 394 U.S. 557 (1969), this Court held that the mere possession of obscene matter, in the privacy of one's home, cannot be made criminally punishable under the Constitution. Whether grounded upon the right to privacy (United States v. 12,200-Ft. Reels, 413 U.S. 123, 126 (1972)) or the First Amendment (Bowers v. Harwick, 478 U.S. __, 106 S.Ct. 2841, 2846 (1986), the right to merely possess matter within the privacy of one's home is not without limitation. Thus in Stanley this Court cautioned that there was no intention "to express any opinion on statutes making criminal possession of other types of

printed, filmed, or recorded materials. . . . In such cases, compelling reasons may exist for overriding the right of the [individual to possess those materials." (394 U.S. at 568 n. 11.)

In New York v. Ferber, 458 U.S. 747 (1982) this Court upheld a New York statute which prohibits the knowing promotion of sexual performances by children under 16 years of age by the distribution of films depicting young boys masturbating. This statute was deemed not to forbidden by the First Amendment even though the prohibited material need not be legally obscene. Although this Court focused its discussion in Ferber on the distribution of child pornography, the constitutional power to prohibit distribution was in part grounded upon the insufficiency of efforts to halt the

production of such pornography. Besides noting that "the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation," this Court asserted that "the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled." (458 U.S. at 759.) The production and distribution of child pornography were equally regarded in Ferber to be within the scope of constitutionally valid police powers.

Petitioner's point is that the constitutional right, grounded upon Stanley, to merely possess obscene matter in the privacy of one's house is broad enough to encompass the right to merely

possess child pornography in the privacy of one's home. However, the evils associated with child pornography, which justifies this Court's holding in Ferber, that a child pornography statute is valid albeit the material is not required to be legally obscene, are sufficiently serious and distinct so as to justify the conclusion that a statute prohibiting the mere possession of child pornography, even in the privacy of the home, is not facially invalid. Such indeed is the holding in Ohio v. Meadows 28 Ohio St.3d 43, 503 N.E.2d 697 (1986) (cert. den. __ U.S. ___, 107 S.Ct. 1581 (1987)). But the issue of the validity of such a statute is not before this Court in the instant case. Petitioner was not charged and convicted of mere possession of child pornography. Rather, he was charged and convicted of

having violated California Penal Code section 311.3, subdivision (a), which makes it a criminal offense (i.e., sexual exploitation of a child) for anyone to "knowingly develop, duplicate, print, or exchange any film, photograph, video tape, negative, or slide in which a person under the age of 14 years engaged in an act of sexual conduct."

Of course, if the mere private possession of child pornography can be criminally punishable under the Constitution, it follows that the mere duplication of such material, albeit in the privacy of the home, can also be criminally punishable under the Constitution. But as the Court of Appeal of the State of California observed in the instant case: "we are not dealing with the 'mere possession of obscene materials' protected by the First

Amendment, but with the reproduction of child pornography, the control of which is subject to different constitutional limitations." (In re Duncan, 189 Cal. App.3d 1348, 1357, 234 Cal.Rptr. 877 (1987).) Assuming arguendo that no reasons are compelling enough to constitutionally justify a statute criminalizing the mere private possession of child pornography, it does not follow that such reasons are insufficient to constitutionally justify a statute criminalizing the mere private duplication of child pornography.

In the first place, as we have seen, this Court's opinion in Ferber justified a statute prohibiting the distribution of child pornography because of the factual inadequacy of criminalization limited to the production of such material in order

to prevent the sexual exploitation of children. Hence, Ferber must itself be understood as indicating that a statute which prohibits the mere production of child pornography (including the reproduction of such material) is constitutionally valid, whether or not the intent to distribute or to display to another can be proven, in order to prevent sexual exploitation of children. As the superior court observed in its memorandum of decision (Appendix C to Petition, pp. 31-32): "[A] child is abused not only by the original pornographic act which is photographed, but by virtue of the child's perceiving that a permanent record of his or her participation has been created. Emotional harm occurs because of the child's knowledge that the photographic record of his or her involvement is

capable of being viewed or circulated at any subsequent time, at the will of the possessor of the photographic record." The developing or duplication of child pornography are aspects of its production.

In the second place, this Court has itself declared that the constitutional right to merely possess obscene material in the privacy of one's home does not entail a correlative right to acquire or import such material. (United States v. 12,200-Ft. Reels, supra, 413 U.S. at 127.) Thus, the government may constitutionally prohibit the importation of obscene material even though the importer claims that such material is for private, personal use and possession only. This Court was also "note[d] that it is extremely difficult to control the uses to which obscene material is put once it

enters this country. Even single copies represented to be for personal use, can be quickly and cheaply duplicated by modern technology thus facilitating wide-scale distribution." (413 U.S. at 129.) Similar considerations justify the statutory proscription of the reproduction of child pornography, albeit for only the personal use of the possessor. Clearly, a statute which includes the intent to distribute or display as an element of the offense of duplicating child pornography would not be as efficacious as one in which that element is absent. Otherwise the requisite intent in a given case might be difficult to prove beyond a reasonable doubt, although one could be certain beyond a reasonable doubt the reproductions of child pornography will tend to circulate.

As this Court has distinguished mere private possession of obscene matter from the acquisition of such material, albeit for private use only, surely, the same should be done with respect to child pornography. Duplication of child pornography is a species of acquisition of such material.

CONCLUSION

Interestingly enough, "[p]etitioner willingly concedes that the materials he duplicated are not entitled to First Amendment protection and further concedes that the act of making photographic duplicates of such materials is not protected by the Constitution as a form of free speech or expression." (Petition, p. 20.) This concession makes shipwreck of

his argument since Stanley is considered by petitioner as a right-to-privacy case. But the right to merely possess obscene matter in the privacy of the home has been most recently explained by this Court to rest upon First Amendment considerations alone. (Bowers v. Harwick, supra, __ U.S. at __, 106 S.Ct. at 2846.) Assuming that Stanley is properly considered as a right-to-privacy case, the compelling interest of the State in the suppression of the sexual exploitation of children justifies a statute which prohibits the production or reproduction of child pornography. The constitutional right to merely possess child pornography in the privacy of the home, assuming arguendo there is such a right, could be arguably regarded as justified by overriding privacy interests pertaining to what is essentially passive

conduct (i.e., mere possession), as distinguished from essentially active conduct, such as the acquisition, production, or reproduction of child pornography. The fallacy of petitioner's argument, that the right to privacy extends to the right to merely duplicate child pornography if it initially extend to mere possession, has been anticipatorily exposed in United States v. 12,200-Ft. Reels, supra, as follows:

> The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth 'logical' extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded

> it, although the aggregate or end result is one that would never have seriously been considered in the first instance. This kind of gestative propensity calls for the 'line drawing' familiar in the judicial, as in the legislative process: 'thus far but not beyond.' Perspectives may change, but our conclusion in Stanley represents such a line of demarcation; and it is not unreasonable to assume that had it not been so delineated, Stanley would not be the law today.

(413 U.S. at 127. Footnote omitted.) It is submitted that this Court need not wait until third, fourth, or fifth "logical"

extension of Stanley is presented for its consideration. The illicit process can be arrested at the first proposed logical extension as presented in this case. The petition for certiorari should be therefore be denied.

Respectfully submitted,

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